No. 92-1564

In the

Supreme Court of the United States

October Term, 1992

Merritt E. Jones, individually; Pamela Jones, by Merritt E. Jones, her father and next friend; John Doe, individually; Jane Doe, by John Doe, her father and next friend,

Petitioners,

v.

Clear Creek Independent School District,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The National School Boards Association (NSBA) respectfully moves this Court to grant it leave to file the attached brief as amicus curiae in the above captioned case.

Petitioners have consented to NSBA's participation in this matter. A letter attesting to their consent has been submitted to this Court. Respondents have refused consent.

NSBA is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children. In carrying out this responsibility, school boards must set policy on a wide spectrum of issues, including appropriate practices at school activities such as graduation ceremonies.

In the wake of this Court's decision in Lee v. Weisman, 112 S. Ct. 2649 (1992), school boards across the country have been subjected to a barrage of emotionally charged and often well organized political pressure to maintain the traditional practice of invocations and benedictions at commencement ceremonies and other school activities. The efforts of school boards to understand the scope of and to comply with this Court's interpretation of the constitutionality of these practices have been immensely complicated by the lower court's decision in the case at bar. Its impact has reached far beyond the jurisdictional boundaries of the Fifth Circuit to exacerbate disputes at every level about the propriety of prayer at school events. Whatever their personal and political inclinations may be on this issue, school board members with virtual unanimity agree on

the need for additional guidance from this Court. Because this case has such direct bearing on how school boards will resolve this issue, NSBA respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

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Lee v. Weisman,
112 S.Ct. 2649 (1992) . . . . . passim

OTHER AUTHORITIES:

"ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, South Carolina Associated Press, 1/6/93 12

American Center for Law and Justice Bulletin 8/21/92 7

American Center for Law and Justice Bulletin 11/20/92 8

American Center for Law and Justice Bulletin 1992-1993 8

American Center for Law and Justice News Release 4/5/93 7,8

"Attorney General Disputes 'Loopholes' in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court ruling on school prayer," Ann Arbor News, April, 1993 9

"Attorney General says Prayer at Athletic Events Legal," Rock Hill, South Carolina, Associated Press, 1/5/93 . . . 12

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"Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska, Associated Press, 4/20/93 . . . 9

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"School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin, Associated Press, 1/20/93 9

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"Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93 9

"Tennessee School Prayer: Senate Committee Gives Nod," Tennessean, 4/21/93 9

"Virginia Schools Struggle with Supreme Court Ruling on Prayer," Richmond, Virginia Associated Press, 4/19/93 10

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BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of

Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

REASON FOR GRANTING THE WRIT

A religious war is being fought in the public school schools in this country between advocates of prayer at graduation and other school events (who interpret this Court's decision in Lee v. Weisman narrowly to preclude only clergy-led prayer at graduation ceremonies) and those who interpret Lee to preclude any direct involvement by school officials in prayer at any school event. This is not just a routine legal dispute. Both sides are using the public schools and public school children as tools to argue their respective sides of this issue. School boards are caught in the middle and do not know which way to turn. They are on the horns of a

dilemma: should they take the more conservative approach and treat Lee v. Weisman as precedent in guiding their decisions -- thus risking the wrath of constituents who cite the case at bar for the proposition that they have a "right" to pray at graduation or do they follow the advice of lawyers for religious interests who argue that Lee has limited value as precedent, applying only to the facts in that case -- thus risking a lawsuit by the ACLU which has threatened to file suit to protect the interests of those who do not support involvement of the schools in prayer at school events? Only this Court can solve this dilemma and NSBA urges the Court to do so, thus saving the schools from the onslaught of litigation and public dissension on this very emotional issue -- a raging controversy that has been intensified since the Fifth Circuit's decision in the case at bar.

ARGUMENT

Introduction

NSBA enters this case as an amicus only after grave consideration. Although this brief takes no position on the merits of the issue in this case (nor will amicus take a position in the event this Court grants the petition for certiorari), nevertheless, NSBA has, by filing a brief in support of the petition, taken a position in opposition to one of its members. NSBA takes that extraordinary step only because it believes that this issue cries out for a resolution. NSBA is aware of the advantage to this Court and to the law of allowing issues to percolate through the courts of appeals before final resolution by this Court. Unfortunately, this percolation process is causing great pain in the schools and is splitting communities apart. Both sides, of course, purport to speak with authority as to the state of the law and add more confusion than clarity to the

debate. Those supporting the decision below characterize their opponents as "anti-Christian," while those who contend that student-led prayer is unconstitutional maintain that their opponents are knowingly violating the law of the land.

I. The lower court decision calls into question the viability of this Court's decision in Lee v. Weisman, thus creating great confusion for those attempting to comply with Lee.

The Fifth Circuit has expressed its opinion in this case in a manner which implies that Lee v. Weisman, 112 S.Ct. 2649 (1992), may have been wrongly decided. Whether or not this Court agrees with the conclusions of the Fifth Circuit on the facts in this case, the somewhat disrespectful tone of the decision communicates the unfortunate message that this Court's decision in Lee is not "good law."

This intemperance of the lower court decision together with the immense degree of publicity engendered by advocacy groups has made judicious policymaking difficult, if not

impossible. Even where school boards disagree as a matter of policy with particular court decisions, they still want to obey the law and therefore seek legal advice. After Lee was decided, many school lawyers across the country in addressing the variety of factual questions that remained undecided took a conservative approach and advised their clients that direct school involvement in prayer at school activities raised serious implications. In many communities, this cautious interpretation is being overwhelmed by conflicting legal advice that school boards are receiving from interest groups who have elevated the importance of the decision in this case and expanded its impact far beyond the judicial boundaries of the Fifth Circuit.

II. The national publicity and community pressures resulting from the decision below has created a divisive national controversy detrimental to the operation of public schools across the country.

The conflicting pressure imposed by organizations representing religious interests

and those representing interests devoted to the "separation of Church and State" has turned public schools into a battlefield.

One national Christian legal organization, the American Center for Law and Justice (ACLJ), has dispatched an army of "SWAT teams" to "battl[e] it out in the nation's school districts . . . in a nationwide campaign to educate students about their constitutional right to pray and speak out about God at graduation ceremonies . . ." ACLJ News Release, 4/5/93. The mission of this well-funded organization is to fight for prayer in the schools. Since this Court's decision in Lee, the American Center for Law and Justice has sent numerous bulletins to every public school superintendent in the country, containing the Center's legal analysis of Lee and the decision below.

An August 21, 1992 bulletin supported a "See You at the [flag]Pole" event for students to "offer prayers for their school, teachers,

administrators and the nation." This letter described Lee as answering "only one question: Can school officials invite a member of the clergy to offer a prayer at a school sponsored event?" A November 20, 1992 bulletin begins with the proposition that "voluntary student-led prayer is constitutionally protected on public school campuses." It advocates student-led prayer at graduations and other school events. A bulletin was also sent in November of 1992 dealing with Christmas observances by public schools. A bulletin dated "school year 1992-1993" included an analysis of both Lee and the decision in this case and concluded that "students have the right to include an invocation and benediction in their graduation exercises."

By its own account, the ACLJ is currently involved in disputes relating to student-led prayer in more than 130 school districts in some 25 states. ACLJ News Release, April 5, 1993. News reports from across the country

lend credence to this statement. See, e.g., "Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93; "School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin Associated Press, 1/20/93; "Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93; "Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93; "Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin, Associated Press, 4/14/93; "Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press 4/13/93; "Graduation Prayer Advocates Launch Self-Styled 'SWAT Teams'," Education Daily, 4/6/93; "Attorney General [of Michigan] Disputes 'Loopholes in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court ruling on school prayer,"

Ann Arbor News, April, 1993; "Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska Associated Press, 4/20/93; "Tennessee Prayer" Senate Committee Gives Nod," Tennessean, 4/21/93; "Lawyer Attacks ICLU over Graduation Prayer Issue," Indianapolis, Indiana Associated Press, 4/21/93.

In Virginia, both the American Civil Liberties Union (ACLU) and the ACLJ have sent letters to school districts interpreting the Jones decision. "Virginia Schools Struggle with Supreme Court Ruling on Prayer," Richmond, VA, Associated Press 4/19/93. The ACLU has sent out a bulletin to school districts in a number of other states, challenging ACLJ's interpretation. A spokesman for ACLU said recently that any school district relying on the advice of the American Center for Law and Justice "will get its pants sued," "Can Religion, Graduation Mix?," UPI, 4/5/93.

A similar issue to the graduation prayer issue is also causing a great deal of dissension in the schools, that of prayer at athletic events. Both ACLJ and the ACLU have taken positions on this issue paralleling their positions on student prayer at graduation. ACLJ again interprets Lee as not reaching anything other than clerical prayers at graduation, and ACLU interprets the case to preclude "school sponsored" prayers at any school event.

The Fifth Circuit is the first circuit to decide the athletics issue, as well. In Doe v. Duncanville I.S.D., 1993 WL 67286 (5th Cir. 3/29/93), the circuit interpreted Lee to proscribe a girls' basketball coach from leading prayers before and after practice and at center court during half time and at the conclusion of the game. Circuit Judge Reavley, who also wrote the decision in the case at bar, stated in a footnote that the circuit court "eschewed the tripartite Lemon

analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence." 1993 WL 67286, n. 7.

Meanwhile political activity is rampant on this issue as well. "Attorney General [of South Carolina] says Prayer at Athletic Events Legal," Rock Hill, S.C., Associated Press, 1/5/93; "ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, S.C., Associated Press, 1/6/93; "House [in Oklahoma] Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, OK, Associated Press, 3/13/93.

The decision in the case at bar has been elevated by the national debate and legal machinations of interest groups to a case of national importance and amicus submits that the benefit to be gained by awaiting

additional circuit court decisions on this issue does not justify allowing the continuance of the current division between schools and their communities on this issue. Public schools are used to controversy. Schools are often expected to be the progenitors of solutions to some of society's most contentious social issues, e.g., desegregation, AIDS, crime, drugs, and even asbestos. Perhaps the most wrenching issue of all, in any civilization, is religion. The schools need this Court to assist them in resolving the issue.

Conclusion

Amicus requests this Court to grant the petition for certiorari in order to settle the intense controversy over the permissible scope of official school district involvement in

prayer at school functions.

Respectfully submitted,

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